

(6)  
No. 93-7659

SUPREME COURT U.S.

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In The  
**Supreme Court of the United States**

October Term, 1994

— ♦ —  
LOUISE HARRIS,

*Petitioner,*

vs.

STATE OF ALABAMA,

*Respondent.*

— ♦ —  
On Writ Of Certiorari  
To the Supreme Court Of Alabama

— ♦ —  
**BRIEF FOR PETITIONER**

— ♦ —  
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**QUESTIONS PRESENTED**

1. Is a death sentence invalid where a trial court overrides a jury's advisory verdict of life without parole, when the trial judge relies on no standard or norm to guide his consideration of the jury's verdict and when the appellate courts fail to scrutinize the propriety of the trial judge's override?
2. Does a capital sentencing scheme which requires trial courts to consider the jury's advisory sentencing verdict of life without parole without any direction or guidance and which results in arbitrary and inconsistent application of the death penalty violate the Eighth and Fourteenth Amendments?

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BRIEF FOR PETITIONER

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OPINIONS BELOW

The June 25, 1993 opinion of the Alabama Supreme Court is reported at *Ex parte Harris*, 632 So.2d 543 (Ala. 1993), and is reproduced in the joint appendix. (J.A. 103) The October 29, 1993 rehearing opinion of the Alabama Supreme Court is reported at *Ex parte Harris*, 632 So.2d 543, 547 (Ala. 1993), and is included in the joint appendix. (J.A. 111) The opinion and denial of rehearing by the Alabama Court of Criminal Appeals is reported at *Harris v. State*, 632 So.2d 503 (Ala.Crim.App. 1992), and is reproduced in the joint appendix. (J.A. 9)

## JURISDICTION

A denial of rehearing was issued by the Alabama Supreme Court on October 29, 1993. A timely petition for writ of certiorari was filed in this Court on January 26, 1994 and certiorari was granted on June 27, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3) (1986), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alabama Code Section 13A-5-47(e) (1982) provides:

In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory

verdict, unless such a verdict has been waived pursuant to section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

## STATEMENT OF THE CASE

Louise Harris, a thirty-six year-old African American mother of seven, was sentenced to death after an Alabama jury returned an advisory verdict of life imprisonment without possibility of parole. (R. 731-32, 1012) The jury made its sentencing determination after convicting Mrs. Harris of a single count of capital murder for her role in the slaying of her husband, Isaiah Harris, in March of 1988. (R. 953)<sup>1</sup> Before returning a sentencing verdict, the jury learned that Mrs. Harris had no prior involvement of any type with the criminal justice system, was a responsible parent, worked at three different jobs, and was active in her church. (R. 684, 689, 733, 995) The jury was instructed at the penalty phase that upon a weighing of aggravating and mitigating circumstances, it was to recommend a sentence of either death or life imprisonment without parole. (R. 975-78) On July 13, 1989, the jury

<sup>1</sup> Mrs. Harris was originally charged with two counts in the single killing, one for murder pursuant to a contract for hire or for pecuniary gain, Ala. Code § 13A-5-40(a)(7) (1982), and another for the murder of a law enforcement officer, Ala. Code § 13A-5-40 (a)(5) (1982), because her husband was employed as a Montgomery County deputy sheriff. The second count was dismissed, however, after a finding that Mr. Harris's occupation was irrelevant to a case about domestic issues. (R. 826)

by a vote of 7-5 rejected the death penalty and returned an advisory verdict of life imprisonment without parole. (R. 1012)

At a separate proceeding several weeks later, the trial judge found only the one aggravating circumstance included in the offense and numerous mitigating factors. (R. 1051; J.A. 4-7) Nevertheless, with only cursory mention of the jury's recommended sentence, the trial judge overrode its verdict and sentenced Mrs. Harris to death. (J.A. 2-8) The trial judge did not explain why he rejected the jury's recommendation nor what role, if any, its advisory verdict played in the sentencing decision. (J.A. 7-8)<sup>2</sup>

As is true in every other instance of override, neither the Alabama Court of Criminal Appeals nor the Alabama Supreme Court examined why the jury's advisory verdict was rejected in this case. (J.A. 89-93, 103) The Alabama Court of Criminal Appeals dismissed Mrs. Harris's contention that Alabama's standardless override scheme is unconstitutional and that rejection of the jury's advisory verdict in her case was arbitrary. (J.A. 89) The Alabama Supreme Court affirmed without comment. (J.A. 103-111)

The murder of Isaiah Harris was arranged by Lorenzo McCarter, who had been involved in an affair

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<sup>2</sup> The court signed a sentencing order prepared by the state. (R. 1254-55; State's Supplemental Record). After a hearing on March 7, 1991, at which the state moved posttrial to correct the sentencing order, the trial court agreed to modify its earlier order in accordance with the state's request. (State's Supplemental Record)

with Mrs. Harris. (R. 613, 738)<sup>3</sup> McCarter joined three of his friends in ambushing Mr. Harris as he drove by in his car on the way to work. (R. 624-30) Mr. Harris was killed instantly by a single gunshot. (R. 402) McCarter exchanged testimony for leniency and was the key witness against Mrs. Harris. (R. 602, 642)<sup>4</sup>

McCarter maintained that Mrs. Harris had asked him to kill her husband so that they could share his retirement benefits and that he had involved his friends in the deed at her behest. (R. 615) The state also presented testimony from the men whose involvement McCarter had solicited (R. 474, 479), as well as evidence of employment insurance benefits that would accrue to Mr. Harris's estate upon his death. (R. 560-61, 571-75, 582-83).

Mrs. Harris testified at the guilt phase of her trial that she had no knowledge of McCarter's plan to kill her

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<sup>3</sup> Mrs. Harris had been experiencing problems in her marriage for several years. She had left home briefly in late 1986 following an incident in which Mr. Harris hit her in the head and threatened her with a gun. (R. 731) Mrs. Harris filed for divorce but later reconciled with her husband. (R. 734-35) She entered into the affair with Lorenzo McCarter in the summer of 1987. (R. 737)

<sup>4</sup> McCarter was spared the death penalty due to his testimony and was sentenced by agreement with the state to life without parole. (R. 642) Two of McCarter's three friends in the car, Michael Sockwell and Alex Hood, were also tried and convicted of capital murder. (The third passenger, Freddie Patterson, was not charged. (R. 332)) Sockwell was sentenced to death by the trial court after the jury in his case recommended life without parole. *Sockwell v. State*, No. CR-89-225 (Ala.Crim.App. Dec. 30, 1993). Hood was sentenced to life without parole. *Hood v. State*, 598 So. 2d 1022 (Ala.Crim.App. 1991).

husband.<sup>5</sup> (R. 753-54) She also presented considerable evidence to the jury about her background and character. At the time of her arrest, she was raising seven children, four of whom were the biological children of Mr. Harris, who was her second husband. (R. 731-32) She was an avid churchgoer and involved the family in church activities. (R. 684, 689, 733) Witnesses testified that she held three jobs simultaneously, working at the First Baptist Church as well as in the private homes of two women prominent in the Montgomery community, including one for whom she had been employed for ten years. (R. 683, 695, 733) These and other witnesses attested to petitioner's "excellent" reputation in the community (R. 696) and her long-standing commitment to the church and to hard work.

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### SUMMARY OF ARGUMENT

Alabama is the only state in the country which requires the participation of both jury and judge in capital sentencing but fails to regulate the relationship between the two decisionmakers. Alabama law recognizes the jury as a significant partner in the sentencing process. Ala. Code § 13A-5-46 (1982); *Ex parte Williams*, 556 So. 2d 744 (Ala. 1987). Yet the role of the advisory

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<sup>5</sup> Mrs. Harris was at home with her children at the time of the murder. (R. 432, 748-752) The state argued for petitioner's involvement on the ground that she called McCarter after her husband had left for work to alert him to his whereabouts. Mrs. Harris testified that she called McCarter at that time regularly. (R. 749-50) McCarter concurred in this. (R. 659)

jury verdict in capital sentencing remains indeterminate. The trial judge who takes issue with a jury's recommendation of life-without-parole is provided with no direction regarding the role that recommendation should play in the ultimate determination of punishment. Ala. Code § 13A-5-47(e) (1982) (stating only that advisory verdict must be "considered"); *Sockwell v. State*, No. CR-89-225 (Ala.Crim.App. Dec. 30, 1993), slip op. at 50 (no Alabama law specifies weight to be accorded advisory verdict); *Hadley v. State*, 575 So. 2d 145, 158 (Ala.Crim.App. 1990) (Alabama has yet to formulate standard).

The result has been the arbitrary and inconsistent treatment of the jury's advisory life verdict that is in evidence in Louise Harris's case. Absent direction, trial courts randomly assess the jury's function in the process: some treat the life recommendation as a mitigating factor; others consider it separately from the aggravation/mitigation analysis; some accord great deference to the jury's life recommendation; others barely reference it in their sentencing orders. The judge who sentenced Mrs. Harris to death arbitrarily assigns a different role to the advisory verdict depending on the case before him. In petitioner's case, he did not find the recommendation mitigating, and gave it only passing reference in his order sentencing her to death. (J.A. 2-8) What function, if any, the jury's sentence played and why it was rejected were never explained.

The failure to regulate the relative functions of the sentencing jury and judge has allowed an arbitrary element to enter into an otherwise regularized process.

Because Alabama trial judges use haphazard and capricious procedures in assessing and rejecting jury life recommendations, it is impossible to distinguish rationally between those who receive death and those who do not. *Spaziano v. Florida*, 468 U.S. 447, 460 (1984). The absence of any written findings regarding the role the recommendation played or the reasons for its rejection deprives the appellate courts of an avenue for rational review. *Arave v. Creech*, 113 S. Ct. 1534, 1540 (1993); *Proffitt v. Florida*, 428 U.S. 242, 251 (1976). This inconsistent consideration of the jury's life verdict in Alabama violates the Eighth Amendment prohibition against arbitrariness and caprice in capital sentencing.

The Alabama appellate courts have not acted to save the statute from the infirmities of inconsistent application. The Alabama Court of Criminal Appeals and the Alabama Supreme Court have failed to scrutinize death sentences following jury life recommendations and have never reversed a sentence of death due to improper judicial override. Despite the importance of meaningful appellate review in death penalty cases, *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990), they have sanctioned a process that is both arbitrary and applied without an even hand. *Sochor v. Florida*, 112 S. Ct. 2114 (1992); *Parker v. Dugger*, 498 U.S. 308 (1991).

Louise Harris was sentenced to death after arbitrary consideration of the jury's life-without-parole verdict. The imposition and affirmance of her death sentence pursuant to an unpredictable and capricious process violated the most basic of Eighth and Fourteenth Amendment guarantees.

## ARGUMENT

### I. THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBIT DEATH SENTENCES OBTAINED ON THE BASIS OF ARBITRARY PROCEDURES.

This Court has only recently reaffirmed the "one principle" common to its Eighth Amendment decisions governing state procedures for administering the death penalty: "The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." *Tuilaepa v. California*, 114 S. Ct. 2630, 2635 (1994). The states have broad latitude to shape their death-sentencing practices as they see fit, *Spaziano v. Florida*, 468 U.S. 447, 464 (1984), but "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice." *Gardner v. Florida*, 430 U.S. 349, 358 (1977).<sup>6</sup> "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468

<sup>6</sup> See also *Zant v. Stephens*, 462 U.S. 862, 885 (1983); *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988); *Romano v. Oklahoma*, 114 S.Ct. 2004, 2009 (1994).

U.S. at 460.<sup>7</sup> This is why the Court's opinions have repeatedly emphasized " 'procedural protections . . . intended to ensure that the death penalty will be imposed in a consistent, rational manner.' " *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990) (quoting *Barclay v. Florida*, 463 U.S. 939, 960 (1983) (Stevens, J., concurring)). The reiterated commands that the states "regularize, and make rationally reviewable the process for imposing a sentence of death," *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976)<sup>8</sup>, that they rectify "procedural rules that tended to diminish the reliability of the sentencing determination," *Beck v. Alabama*, 447 U.S. 625, 638 (1980),<sup>9</sup> and that they ensure "measured, consistent application and fairness to the accused," *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982),<sup>10</sup> reflect complementary formulations of the same fundamental point: that "death penalty statutes must be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *California v. Brown*, 479 U.S. 538, 541 (1987).

While one important reflection of this point has been the line of cases invalidating unduly vague criteria for

<sup>7</sup> See also *Lockett v. Ohio*, 438 U.S. 586, 601 (1978); *Parker v. Dugger*, 498 U.S. 308, 321 (1991).

<sup>8</sup> See also *Arave v. Creech*, 113 S. Ct. 1534, 1540 (1993); *Lewis v. Jeffers*, 497 U.S. at 774.

<sup>9</sup> See also *Woodson*, 428 U.S. at 305; *Mills v. Maryland*, 486 U.S. 367, 383-84 (1988); *Simmons v. South Carolina*, 114 S. Ct. 2187, 2198 (1994) (Souter, J., concurring). See also *McKoy v. North Carolina*, 494 U.S. 433, 454 (1990) (Kennedy, J., concurring).

<sup>10</sup> See also *Spaziano v. Florida*, 468 U.S. at 459; *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990).

eligibility for capital sentencing and unduly vague selection standards, see, e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Stringer v. Black*, 112 S.Ct. 1130 (1992); *Espinosa v. Florida*, 112 S.Ct. 2926 (1992) (per curiam)), these cases merely exemplify the fundamental principle and do not exhaust it. Time and again the Court has held that the interjection of any potentially decisive arbitrary factor into the capital sentencing process affronts the Eighth Amendment's concern for principled and consistent administration of the death penalty.<sup>11</sup>

For example, in *Gardner v. Florida*, the sentencing judge's *ex parte* consideration of an undisclosed presentence investigation report threatened to introduce such an arbitrary factor into Gardner's sentencing. This Court invalidated Gardner's death sentence, stating that:

Since the State must administer its capital-sentencing procedures with an even hand it is important that the record on appeal disclose to the reviewing court the considerations which motivate the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia* [408 U.S. 238 (1972)].

<sup>11</sup> See, e.g., *Arave v. Creech*, 113 S. Ct. 1534, 1542 (1993) ("When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so.") See also *Godfrey v. Georgia*, 446 U.S. at 433; *Maynard v. Cartwright*, 486 U.S. at 362.

*Gardner v. Florida*, 430 U.S. at 361 (citation omitted).<sup>12</sup>

In *Beck v. Alabama*, 447 U.S. 625 (1980),<sup>13</sup> the withdrawal from a capital jury's consideration of lesser included offenses supported by the evidence created the likelihood that crime-concerned jurors would irrationally over-convict rather than under-convict when given no third option. The intrusion of this single, potentially persuasive arbitrary factor into the process leading to a death sentence was sufficient to invalidate the Alabama procedure because it offended the Eighth Amendment's concern for "reliability in the determination that death is the appropriate punishment" in each individual case. *Id.* at 638 n.13.<sup>14</sup> In *Sochor v. Florida*, 112 S. Ct. 2114 (1992), and *Johnson v. Mississippi*, 486 U.S. 578 (1988), still another single but potentially decisive arbitrary factor – a factually unfounded or undermined aggravating circumstance

<sup>12</sup> "We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321 (1991); see also *Clemons v. Mississippi*, 494 U.S. at 749; *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).

<sup>13</sup> The *Beck* decision required that Alabama restructure its capital sentencing procedures. This was done by judicial decision in 1981. See *Beck v. State*, 396 So. 2d 645 (Ala. 1981). Later that year the Alabama Legislature codified the changes *Beck* wrought and amended the statute to include the *Beck* provisions affirming the jury's sentencing role. See Ala. Code § 13A-5-46 (1982); see also *infra* at 17.

<sup>14</sup> In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the same concern was held to require the invalidation of a death sentence potentially influenced by another kind of arbitrary factor: a jury's possible willingness to abdicate responsibility for its life-or-death decision when misinformed about the scope of judicial review of that decision.

– was found sufficient to require the invalidation of death sentences resulting from an otherwise adequately regulated capital sentencing procedure.<sup>15</sup>

In short, it is plain that the Eighth Amendment will not countenance death sentences produced by a process in which an uncontrolled, unreviewable, capricious factor may have affected the life-or-death sentencing decision.

In *Parker v. Dugger*, 498 U.S. 308 (1991), the Court applied this principle both to the appellate review stage of the capital sentencing process and to the allocation of responsibility between capital sentencing decisionmakers. Because the Florida Supreme Court had arbitrarily affirmed a trial court's rejection of a jury's advisory verdict of life imprisonment, this Court held that Parker had been subjected to an irrational and capricious death-sentencing procedure and reversed his sentence. *Id.* at 321-22. The result plainly would have been the same had the Florida Supreme Court failed persistently to ensure proper allocation of authority instead of only episodically as evidenced in Parker's case.

Yet this is precisely what the Alabama trial and appellate courts have done in cases of override generally and in Louise Harris's case in particular. Alabama has the only capital sentencing scheme in the nation which requires the participation of both jury and judge but fails to regulate the relationship between the two decisionmakers.<sup>16</sup> In the

<sup>15</sup> See also *Stringer v. Black*, 112 S.Ct. 1130 (1992); *Espinosa v. Florida*, 112 S.Ct. 2926 (1992).

<sup>16</sup> The involvement of both jury and judge is mandated in only four death penalty jurisdictions: Florida, Indiana, Delaware, and Alabama. Fla. Stat. Ch. 921.141 (1991); Ind. Code

absence of any such regulation, jury recommendations of life without parole have played unpredictable and indeterminate roles in the sentencing process and have been rejected for reasons that remain wholly undisclosed.<sup>17</sup> The arbitrary and unreviewable treatment of the jury's advisory verdict in Louise Harris's case fundamentally tainted the process by which she was sentenced to death. See *Gardner v. Florida*, 430

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§ 35-50-2-9(e) (1986); Del. Code Ann. tit. 11 § 4209(d) (1979); Ala. Code §§ 13A-5-42 to -47 (1982). The supreme courts of Florida and Indiana have set forth standards regulating the roles of jury and judge. When the two reach differing assessments as to punishment, the function of the jury's life recommendation in the final determination of sentence is clear: the advisory life verdict can be set aside only if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975); see also *Martinez-Chavez v. State*, 534 N.E.2d 731, 735 (Ind. 1989) (for judge to impose death after jury life recommendation, "facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate").

Delaware, which only recently required both jury and judge to participate in capital sentencing, appears also to be adopting the *Tedder* standard for governing disagreements between decisionmakers. See *Pennell v. State*, 604 A.2d 1368, 1377-78 (Del. 1992). There have to date been no death sentences imposed under Delaware's new statute after jury life recommendations.

<sup>17</sup> Life without parole and death are the only sentencing options for a defendant convicted of capital murder in Alabama. Ala. Code § 13A-5-45 to -47 (1982). Judicial rejection of advisory verdicts of death do not pose a problem under the Eighth and Fourteenth Amendments. See *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (at various stages of process, actors make decisions to remove defendant from consideration as candidate for death penalty; Eighth Amendment concerned not with this result but with minimizing risk that death penalty imposed on capriciously selected group).

U.S. at 358 (defendant has legitimate interest in character of procedure leading to imposition of death).

## II. ALABAMA'S CAPITAL SENTENCING SYSTEM REQUIRES THE PARTICIPATION OF BOTH JURY AND JUDGE.

The Alabama Legislature and the Alabama Supreme Court have evinced a clear commitment to maintaining the role of the jury in capital sentencing proceedings. Drawing on the substantial part jurors have historically played in Alabama's capital sentencing process,<sup>18</sup> state law requires that the jury recommendation ensue only from carefully tailored and protected procedures.

The signal importance of the jury function in capital sentencing was set out most explicitly by the Alabama Supreme Court in its seminal opinion on the death penalty, *Beck v. State*, 396 So. 2d 645 (Ala. 1981). *Beck* followed this Court's opinion in *Beck v. Alabama*, 447 U.S. 625 (1980), which, as noted above, invalidated the Alabama statute then in operation to the extent that it precluded the jury's consideration of lesser included offenses. In

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<sup>18</sup> Alabama has in essence a trifurcated system for sentencing defendants to death. A jury first determines whether an accused is eligible for the death penalty by reaching a decision regarding guilt or innocence. Ala. Code § 13A-5-43 (1982). If a defendant is found guilty of a capital offense, the case then moves to a sentencing hearing before the same jury. Ala. Code §§ 13A-5-45, -46 (1982). After hearing evidence and argument, the jury provides a penalty recommendation to the trial court which imposes sentence. Ala. Code §§ 13A-5-46(d),(g), -47 (1982).

determining how the sentencing scheme could be restructured, the supreme court dismissed the state's contention that under Alabama constitutional and common law the judge could sentence without jury participation. *See Beck v. State*, 396 So. 2d at 660 (solution to problem "cannot be effected by the elimination of the jury's participation in the sentencing process"). Invoking not only legislative intent but also Alabama's long history of capital jury sentencing,<sup>19</sup> the court declared:

While the jury is not the final sentencing authority under the capital sentencing scheme set out in the statute, the requirement that the jury fix the punishment was deliberately included in the statute by the legislature. . . . [W]e believe that the legislature intended to have jury input in the sentencing process. Throughout Alabama's history, juries have always played a major role in capital cases.

*Id.* at 659. *See also Prothro v. State*, 370 So. 2d 740, 743 (Ala.Crim.App. 1979) (jury function in capital cases has been "assiduously . . . guarded" throughout the years).

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<sup>19</sup> *Beck* examined the jury role as established by state penal codes dating back to the early 1800s. In the early nineteenth century death sentences were mandatory following a jury determination of guilt for certain offenses. *Id.* at 648-49. Each of the ten statutes considered by the *Beck* court from the 1840s until the law was revised in 1975 required the jury to make the capital sentencing decision under a grant of discretion. *Id.* at 649-652. *See, e.g.,* Ala. Code § 15-15-24(a) (1982) ("The court shall not in any event, however, impose capital punishment without the intervention of a jury.")

The Alabama statute presently in operation codified the jury's participation in capital sentencing.<sup>20</sup> The Alabama Legislature fashioned Alabama's sentencing scheme around the unique importance attributed to the jury role in the state as consistently reflected in legislative and common law traditions.<sup>21</sup> *See also Johnson v. State*, 502 So. 2d 877, 879 (Ala.Crim.App. 1987) (jury plays "key role" in sentencing phase of capital case, as is clear in *Beck*); *Edwards v. State*, 452 So. 2d 487, 493 (Ala.Crim.App. 1982), *rev'd on other grounds*, 452 So. 2d 503 (Ala. 1983) (*Beck* makes clear that jury participates in sentencing scheme).

The jury's "key" role in sentencing is manifest in the statutory procedures outlining its participation<sup>22</sup> and in

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<sup>20</sup> Alabama's current capital statute was amended in 1981 to address *Beck*. One pertinent difference between the present law and the statute *Beck* addressed is that a trial court's ability to reject a jury verdict of life-without-parole is now permitted by statute, Ala. Code § 13A-5-47 (1982), whereas that power under the earlier law was made express by judicial ruling. *See Ex parte Hays*, 518 So. 2d 768, 775-76 (Ala. 1986).

<sup>21</sup> Alabama's unbroken adherence to the involvement of a jury in any capital sentencing procedure has led to the unusual requirement that a judge cannot accept a plea of guilty to a capital offense and impose a life-without-parole punishment without jury participation. Ala. Code § 13A-5-42 (1982). *See also Youngblood v. State*, 372 So. 2d 34 (Ala.Crim.App. 1979) (trial court in capital case could neither determine guilt nor fix punishment of defendant without intervention of jury, even though defendant sought to plead guilty); *Prothro v. State*, 370 So. 2d at 746 (Alabama law does not permit trial court, without jury, to fix punishment in capital case).

<sup>22</sup> The statute requires a full hearing that must comport with due process and that provides the jury with every element

the case law interpreting them. That Alabama law views the jury as a vital partner in the punishment determination is evident in its refusal to allow legal errors in the jury proceeding to go uncorrected. Although the judge is the final sentencing authority, instructional and evidentiary errors of law before the sentencing jury will require reversal even if not replicated before the sentencing judge.

For example, in *Ex parte Williams*, 556 So. 2d 744 (Ala. 1987), the sentencing jury had been instructed that it could consider the aggravating circumstance that Williams was under sentence of imprisonment at the time of his crime. Ala. Code § 13A-5-49(1) (1982). In fact, Williams had not been on probation as the jury had been told, and the trial court did not find this aggravating circumstance when sentencing him to death. *Ex parte Williams*, 556 So. 2d at 745. The state argued that the error should be deemed harmless due to the proper consideration of the issue by the judge. The state's high court rejected this reasoning.

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traditionally associated with a penalty phase proceeding. *Richardson v. State*, 376 So. 2d 205 (Ala.Crim.App. 1978), *aff'd*, 376 So. 2d 228 (Ala. 1979). After hearing evidence, argument, and instruction, Ala. Code § 13A-5-46(d) (1982), the panel must have sufficient votes to reach a capital sentencing determination (ten votes for death or seven for life) or a mistrial is declared and a new jury empaneled. Ala. Code §§ 13A-5-46(f),(g) (1982). (The jurors must, of course, be death-qualified, *see Edwards v. State*, 452 So. 2d at 493, and must be "life-qualified" upon request by the defense. *Bracewell v. State*, 506 So. 2d 354, 358 (Ala.Crim.App. 1986)). The jury's participation can be waived only if both parties and the judge concur. Ala. Code § 13A-5-46(c) (1982).

*The basic flaw in this rationale is that it totally discounts the significance of the jury's role in the sentencing process.*

The legislatively mandated role of the jury in returning an advisory verdict, based upon its consideration of aggravating and mitigating circumstances, can not be abrogated by the trial court's errorless exercise of its equally mandated role as the ultimate sentencing authority. Each part of the sentencing process is equally mandated by the statute (§§ 13A-5-46, -47(e)); and the errorless application by the court of its part does not cure the erroneous application by the jury of its part. . . . To hold otherwise is to hold that the sentencing role of the jury, as required by statute, counts for nothing so long as the court's exercise of its role is without error.

*Id.* (emphasis added)

This has been the consistent response when the jury's role has been in some fashion undermined during the penalty phase. When juries have been improperly instructed, as in *Williams*, Alabama law has required a new jury sentencing. *See, e.g., Ex parte Stewart*, No. 1920509 (Ala. Sept. 3, 1993); *Jefferson v. State*, 473 So. 2d 1100 (Ala.Crim.App. 1984), *cert. denied*, 479 U.S. 922 (1986); *see also Hallford v. State*, 548 So. 2d 536 (Ala.Crim.App. 1988) (jury must be given limiting instruction on heinous, atrocious or cruel aggravating factor). New jury hearings have also been ordered where improper argument might have influenced deliberations, *see, e.g., Guthrie v. State*, 616 So. 2d 914, 932 (Ala.Crim.App. 1993) ("We see this as a clear infringement upon the jury's important and critical discretion in

determining whether to recommend a sentence of death or of life imprisonment without parole."); *Ex parte Rutledge*, 482 So. 2d 1262, 1263-65 (Ala. 1984); *Ex parte Whisenant*, 482 So. 2d 1247, 1249 (Ala. 1984), *cert. denied*, 496 U.S. 943 (1990), or where improper evidence was presented to the jury at the penalty phase. *See, e.g., McGahee v. State*, 554 So. 2d 454, 471 (Ala.Crim.App. 1989), *aff'd*, 554 So. 2d 473 (Ala. 1989); *see also Coulter v. State*, 438 So. 2d 336, 349 (Ala.Crim.App. 1982).

### III. THE FAILURE TO PROVIDE STANDARDS GOVERNING THE ROLES OF JURY AND JUDGE HAS LED TO ARBITRARY CONSIDERATION BY TRIAL COURTS OF JURY VERDICTS OF LIFE-WITHOUT-PAROLE.

Despite the recognition that the jury is a significant partner in Alabama's capital sentencing scheme, neither the statute nor the courts have provided a mechanism for governing the jury's decisionmaking authority relative to that of the judge. The statute's sole mention of the role of the jury in the ultimate imposition of sentence is to say that the trial court "shall consider the recommendation of the jury contained in its advisory verdict." Ala. Code § 13A-5-47(e) (1982). Stating simply that the jury verdict is not binding, *id.*, the statute is silent as to how the trial court is to make the recommendation a part of the decisionmaking process or what role the jury's decision should play if there is disagreement as to sentence.

Unlike the supreme courts of Florida, Indiana, and Delaware,<sup>23</sup> the Alabama Supreme Court has not furnished that guidance. The appellate courts have acknowledged that no definition has been given to the relative roles of the two decisionmakers. *See, e.g., Sockwell v. State*, No. CR-89-225 (Ala.Crim.App. Dec. 30, 1993), slip op. at 50 (no Alabama law specifies weight trial court is to accord jury's advisory sentence); *State v. Taylor*, No. CR-92-1313 (Ala.Crim.App. July 8, 1994), slip op. at 28 n.3 (same); *Hadley v. State*, 575 So. 2d 145, 158 (Ala.Crim.App. 1990) ("Alabama Supreme Court has yet to formulate a distinct standard") (quoting *Martinez-Chavez v. State*, 534 N.E.2d 731, 734 n.2 (Ind. 1989)).<sup>24</sup>

#### A. IN IMPOSING SENTENCES OF DEATH, TRIAL COURTS USE ERRATIC METHODS AND APPLY WHIMSICAL STANDARDS IN ASSESSING THE FUNCTION OF THE JURY'S LIFE-WITHOUT-PAROLE PENALTY VERDICT.

The absence of guidance has led Alabama trial courts<sup>25</sup> to confront the advisory verdict in unpredictable

<sup>23</sup> *See supra* note 16.

<sup>24</sup> *See Colquitt, The Death Penalty Laws of Alabama*, 33 Ala. L. Rev. 13, 328 (1981) (trial judge's seminal analysis of Alabama's capital statute, in which it is noted that "Alabama appellate courts can reasonably be expected to develop and apply restrictions to a trial judge's power to reject a sentence recommended by a jury").

<sup>25</sup> Circuit court judges, who face partisan elections every six years, adjudicate Alabama capital cases. Ala. Code § 17-2-7 (1982).

ways and to accord it arbitrary degrees of deference. Treatment of the jury's role varies widely from judge to judge, and, as in petitioner's case, even from one defendant to another sentenced by the same judge. Mrs. Harris was sentenced to death following cursory reference to the jury's contrary recommendation and pursuant to an arbitrary process.

1. **The life verdict is treated in an arbitrary and random fashion: sometimes as a mitigating factor to be weighed against aggravation, and sometimes in an undisclosed manner.**

A central confusion among Alabama sentencing judges is whether an advisory verdict of life without parole is a mitigating circumstance to be weighed with statutory and other nonstatutory mitigation against aggravation.<sup>26</sup> A number of trial judges explicitly define the jury verdict as such and weigh it directly into the balance of factors. *See, e.g., State v. Bush*, No. CC-81-1335 (Montgomery County 1991); *State v. Duncan*, No. CC-87-271 (Dallas County 1988); *State v. Musgrove*, No. CC-83-1476FL (Madison County 1985); *see also State v. Myers*, No. CC-91-988 (Morgan County 1994) (jury life

<sup>26</sup> A copy of all judicial override sentencing orders in Alabama has been lodged in the Clerk's office for the convenience of the Court. A review of these orders reveals that 95% of all overrides in Alabama involve rejection of jury recommendations of life without parole in favor of death. A great number of those whose life verdicts were overridden are, for various reasons, no longer on Alabama's death row.

verdict "single strongest mitigating factor"). Some Alabama judges who deem the jury recommendation "mitigating" appear to do so in the belief that the statute requires as much.<sup>27</sup> *See, e.g., State v. Murry*, No. CC-82-211G (Montgomery County 1982) (stating belief that jury verdict can only be considered as mitigator).

Many courts, however, do not treat the verdict as mitigation. Several have rejected it after finding no non-statutory mitigating circumstances. *See, e.g., State v. Crowe*, No. CC-83-2727 (Jefferson County 1984); *State v. Harrell*, No. 82-1147 (Jefferson County 1983); *State v. Jones*, No. CC-81-610 (Baldwin County 1982). Others make clear that the verdict was not one of the mitigating circumstances considered. This was true in petitioner's case. (J.A. 6-7).<sup>28</sup>

There are other courts, however, that consider the jury's recommendation according to a wholly different

<sup>27</sup> The Alabama statute directs trial courts only as to the weighing of aggravation and mitigation. Ala. Code § 13A-5-47(e) (1982).

<sup>28</sup> Still other courts strive to resolve their dilemma by viewing the advisory verdict not as a full mitigating circumstance under the law but as an "aspect" of mitigation that still must somehow be made part of the weighing process. *See, e.g., State v. Johnson*, No. CC-84-0331 (Morgan County 1985) (jury verdict an "aspect of mitigation separate and apart and in addition to" statutory and nonstatutory factors); *State v. McMillian*, No. CC-87-137 (Monroe County 1988) (jury verdict weighed independently as aspect of mitigation separate and apart from other factors); *see also State v. Owens*, No. CC-84-455 (Russell County 1985) ("The Court finds that the aggravating circumstances outweigh the mitigating circumstances when the jury recommendation of life without parole is also taken into consideration.")

procedure. Their sentencing orders indicate that they do not attempt to factor the advisory verdict into the aggravation/mitigation inquiry at all, but rather take it into consideration in some separate and distinct manner. While it is possible that these judges view the jury's advisory sentence as functioning in a fashion similar to their own, it is unknown what role the recommendation played in these cases.<sup>29</sup> See, e.g., *State v. Neelley*, No. CC-82-276 (DeKalb County 1983) (court has "weighed the aggravating and mitigating circumstances . . . and has given consideration to the recommendation of the jury"); see also *State v. Flowers*, No. CC-89-65 (Baldwin County 1990); *State v. McNair*, No. 90-086 (Henry/Montgomery Counties 1993).

These inconsistent practices are in evidence not only across courtrooms but also in the treatment of different defendants by a single judge. Judge Randall Thomas, who sentenced Mrs. Harris to death, stated only at the outset of the sentencing order in her case that he had "considered" the jury's advisory verdict. (J.A. 2). The verdict was not treated as a mitigating factor, and there is no discussion of how it may have figured into the decision to impose death. The sentencing order of the codefendant, Michael Sockwell, is substantially identical to petitioner's and includes only the same perfunctory mention of the jury's advisory life verdict. *State v. Sockwell*, No. CC-88-1244-HRT (Montgomery County 1991). However, in overriding the jury's verdict in the case of Robert

<sup>29</sup> See *Godfrey v. Georgia*, 446 U.S. at 429 (sentencer's interpretation of factor matter of "sheer speculation").

Coral, the same judge listed the jury's verdict as a mitigating factor and further stated that he gave it "great weight." *State v. Coral*, No. CC-88-741 (Montgomery County 1992). Judge Thomas similarly treated the life verdict as mitigating in a fourth case in which he overrode. *State v. Hooks*, No. CC-85-588-TH (Montgomery County 1986).

There is no discernible distinguishing principle as to why the trial court should have considered the verdict a mitigating factor in some cases yet not in Mrs. Harris's. See *Spaziano v. Florida*, 468 U.S. at 460 (state must administer death penalty in way that can rationally distinguish between those for whom death is appropriate and those for whom it is not); *Maynard v. Cartwright*, 486 U.S. 356, 363 (1988) (citing *Godfrey v. Georgia*, 446 U.S. at 433) (where statute did not provide restraint on arbitrariness, there was no principled way to distinguish between those who received death and those who did not). The judge who sentenced petitioner to death offered the appellate courts no explanation to review<sup>30</sup> regarding the whimsical treatment accorded jury verdicts in his courtroom.<sup>31</sup> *Lewis v. Jeffers*, 497 U.S. at 774.

<sup>30</sup> Alabama trial courts are not required to include findings on why the jury recommendation was rejected in the written sentencing orders mandated by statute. Ala. Code § 13A-5-47 (1982). See *Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (meaningful appellate review made possible by trial court's written findings); *Gardner v. Florida*, 430 U.S. at 360-61 (record on appeal must disclose considerations which motivated death sentence; absence of full disclosure of basis for death sentence undermines appellate review).

<sup>31</sup> The unpredictability with regard to how the advisory verdict will function in a given case also presents notice problems

2. The function the jury's life recommendation serves in the judge's sentencing determination is unpredictable.

Alabama trial courts are also manifestly inconsistent in the function they assign to the jury's life-without-parole determination. Some judges assign none: they impose a sentence of death without even acknowledging in the sentencing order that the jury returned a life verdict. *See, e.g., State v. Turner*, No. CC-83-340-SW (Etowah County 1983). In some cases, the jury's recommendation appears to have played no role in the judge's sentencing determination, but is simply reported in the order. *See, e.g., State v. Lindsey*, No. CC-82-212 (Mobile County 1982) (court "judicially aware" of advisory verdict). In others the court states no more than that it "considered" the jury's contrary verdict without appearing to have accorded it any significance. *See, e.g., State v. McGahee*, No. CC-85-251 (Dallas County 1992); *State v. Sockwell*, No. CC-88-1244-HRT (Montgomery 1991); *State v. Starks*, No. CC-88-23 (Pike County 1989).

On the other hand, some courts read the statute to require that the jury's sentencing determination be given great deference. *See, e.g., State v. Knotts*, No. CC-91-2537-PR (Montgomery County 1993); *State v. Wesley*, No. 83-2501-FDM (Mobile County 1988); *State v. Williams*, No. CC-88-2742 (Mobile 1990); *State v. Gentry*, No. CC-89-1345

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for a defendant who seeks to advocate effectively for a life-without-parole verdict at the judicial sentencing stage. *See Gardner v. Florida*, 430 U.S. at 360 (counsel must have opportunity to comment on facts which may influence sentencing decision); *see also Lankford v. Idaho*, 500 U.S. 110 (1991).

(Jefferson County 1992); *State v. Neelley*, No. CC-82-276 (DeKalb County 1983). A few Alabama judges seem to reject the jury's advisory life verdict only when a death sentence appears to them indisputable. *See, e.g., State v. Frazier*, No. CC-85-3291 (Mobile County 1986) ("if this were not a proper case for the death penalty to be imposed, a proper case could scarcely be imagined"); *see also Ex parte Hays*, 518 So. 2d 768, 777 (Ala. 1986) (agreeing that jury life recommendation was "unquestionably a bizarre result"), *cert. denied*, 485 U.S. 929 (1988).<sup>32</sup>

Lacking any direction regarding the role the jury verdict should play, some judges appear to be groping for a standard. In *State v. Murry*, for example, the court rejected the advisory verdict for life in the first trial and, following a reversal on appeal, accepted it in the second. In the first case, the court initially discussed the jury's determination as that of a separate sentencing body that was entitled to great weight; then employing a different approach, it went on to decide that it could "only categorize the recommendation as a mitigating circumstance given the broad definition of a mitigating circumstance." *State v. Murry*, No. CC-82-211G (Montgomery County 1982). After the second trial, the same judge created a different role for the recommendation after stating that it was "unaware of any reported decision which suggests

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<sup>32</sup> This approach resembles Florida's standard. *See Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975) (facts for death must be "so clear and convincing that virtually no reasonable person could differ" before a jury life recommendation can be rejected).

how much weight [should] be accorded an advisory verdict." *State v. Murry*, No. CC-82-211G (Montgomery County 1989).

The function given the jury's life verdict is again inconsistent even within the practice of a single judge: petitioner's judge apparently gave the jury recommendation no weight in her case, (J.A. 2-8), but "great weight" in another. *State v. Coral*, No. CC-88-741 (Montgomery County 1992). Why the significance of a jury life recommendation, fundamentally distinct in nature from a fact about the crime or the defendant, should change from case to case was never made known.<sup>33</sup>

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<sup>33</sup> Unlike the judge who sentenced Mrs. Harris to death, certain Alabama trial judges interpret the jury role to be significant enough as to require some explanation prior to rejection. See, e.g., *State v. Crowe*, No. CC-83-2727 (Jefferson County 1984) (jury must have reached improper determination; two aggravating circumstances were established by evidence while there were no mitigating circumstances as a matter of law); *State v. Boyd*, No. CC-86-454 (Calhoun County 1987) (jury may have been emotionally influenced by defense evidence during penalty phase); *State v. Burgess*, No. CC-94-781 (Jefferson County 1994) (jury appears to have relied on evidence that trial court does not deem mitigating); *State v. Parker*, No. CC-88-105 (Colbert County 1991) (same). These courts would appear to construe the override power as dependent in some measure on finding a flaw in the jury's separate process. Others, on the contrary, override the life verdict after explicitly stating that the jury had performed its role well. See, e.g., *State v. Jones*, No. CC-81-610 (Baldwin County 1982) (court in overriding not "chastising" jury); *State v. Neal*, No. CC-87-520 (Baldwin County 1990) (jury not "lax in its responsibility").

### 3. Louise Harris's death sentence followed arbitrary treatment of the jury's life-without-parole sentencing recommendation.

The Montgomery County trial judge sentenced Mrs. Harris to death after finding a single aggravating factor included in the offense itself, Ala. Code § 13A-5-49(6) (1982), and numerous mitigating circumstances, both statutory and nonstatutory. (J.A. 5-7). The sentencing order indicated only that the jury's recommendation was "considered" and was not accorded the weight or mitigating effect given the advisory life verdict in other cases. While the way in which the trial court treated the recommendation may have been decisive in its decision to reject it, that process was not disclosed and was not subject to review. The imposition of death in this case was arbitrary. *Spaziano v. Florida*, 468 U.S. at 465-66 (result of sentencing process in override case must not be arbitrary or discriminatory).

### B. THE ALABAMA COURT OF CRIMINAL APPEALS AND ALABAMA SUPREME COURT HAVE PROVIDED PERFUNCTORY REVIEW IN JURY OVERRIDE CASES GENERALLY AND IN LOUISE HARRIS'S CASE PARTICULARLY.

The Alabama courts have never reversed a death sentence due to unwarranted rejection of the jury's

sentencing decision.<sup>34</sup> They have affirmed sentences of death without even a reference to the fact that the jury returned a life-without-parole verdict. *See, e.g., Stephens v. State*, 580 So. 2d 11, 25-26 (Ala.Crim.App. 1990), *cert. denied*, 112 S. Ct. 176 (1991). Often, no more than passing mention is given to the fact that a jury recommended life without parole: no review is undertaken to see if that recommendation was even considered. *See, e.g., Neelley v. State*, 494 So. 2d 669, 680 (Ala.Crim.App. 1985) (court states that "[t]he jury imposed a sentence of life without parole" in assessing a challenge under *Witherspoon v. Illinois*, 391 U.S. 510 (1968); no further mention is made of sentence), *cert. denied*, 480 U.S. 926 (1987); *Turner v. State*, 521 So. 2d 93, 94 (Ala.Crim.App. 1987) ("He was found guilty of the capital offense, and, after a sentencing hearing, the jury recommended that he be punished by life

<sup>34</sup> The courts have sustained challenges to the override either by noting that it is allowed by statute, *see, e.g., Harrell v. State*, 470 So. 2d 1303, 1309 (Ala.Crim.App. 1984), *cert. denied*, 474 U.S. 935 (1985); *Jones v. State*, 456 So. 2d 366, 373 (Ala.Crim.App. 1983), *cert. denied*, 470 U.S. 1062 (1985); *Ex parte Lindsey*, 456 So. 2d 393, 394 (Ala. 1984), *cert. denied*, 470 U.S. 1023 (1985); or by citing to this Court's decisions in *Proffitt v. Florida*, 428 U.S. 242 (1976) or *Spaziano v. Florida*, 468 U.S. 447 (1984) approving the placing of sentencing authority in two decision-makers. *See, e.g., Crowe v. State*, 485 So. 2d 351, 364-65 (1984), *rev'd on other grounds*, 485 So. 2d 373 (1986); *Frazier v. State*, 562 So. 2d 543, 550 (Ala.Crim.App. 1989), *rev'd on other grounds*, 562 So. 2d 560 (Ala. 1989); *Williams v. State*, 627 So. 2d 985, 992 (Ala.Crim.App. 1991), *cert. denied*, 114 S. Ct. 1387 (1994). The Alabama courts have disregarded the Florida system's *Tedder* standard as an "extra" protection that is not constitutionally required. *Owens v. State*, 531 So. 2d 2, 16 (Ala.Crim.App. 1986), *rev'd on other grounds*, 531 So. 2d 21 (Ala. 1987); *Jones v. State*, 456 So. 2d at 382-83.

imprisonment without parole. . . . [T]hereafter, the trial court sentenced appellant to death by electrocution."). The courts often observe that the trial judge considered the jury verdict and end their analysis of the case right there. *See, e.g., Freeman v. State*, 555 So. 2d 196, 213-14 (Ala.Crim.App. 1988) ("The trial judge's findings clearly showed that he considered the jury's advisory verdict."), *cert. denied*, 496 U.S. 912 (1990); *Harrell v. State*, 470 So. 2d at 1309 ("The trial judge considered the jury's recommendation. . . . in his written finding."); *Carr v. State*, No. CR-92-362 (Ala.Crim.App. Mar. 4, 1994), slip op. at 22 ("The trial court's sentencing order reflects the fact that the court gave 'consideration to the recommendation of the jury in its advisory verdict that the defendant be sentenced to life without parole.' ")<sup>35</sup>

Alabama's appellate courts have not only failed to analyze the propriety of the override in the overwhelming majority of cases, but they have also tacitly sanctioned every conceivable approach trial courts have used to take account of the jury's role. They have implicitly approved the consideration of the jury's life verdict as a mitigating circumstance, *see, e.g., Coral v. State*, 628 So. 2d 988 (Ala.Crim.App. 1992);

<sup>35</sup> Even in cases of override, the supreme court's examination of a death sentence is generally limited to the basic concern with passion and prejudice and proportionality accorded all sentences of death and found in most death penalty statutes. Ala. Code § 13A-5-53(b),(c) (1982). *See Clemons v. Mississippi*, 494 U.S. at 744 (Mississippi Supreme Court's performance of proportionality review and finding that death was appropriate when aggravation was compared to mitigation did not salvage death sentence where potentially arbitrary element not specifically addressed).

*Musgrove v. State*, 519 So. 2d 565 (Ala.Crim.App. 1986); *Jackson v. State*, No. 4 Div. 388 (Ala.Crim.App. Aug. 21, 1992), slip op. at 46-47; as not a mitigating circumstance, see, e.g., *Rieber v. State*, No. 91-1500 (Ala.Crim.App. June 17, 1994); *White v. State*, 587 So. 2d 1218, 1231-32 (Ala.Crim.App. 1990), cert. denied, 112 S. Ct. 979 (1992); and as something in between. See, e.g., *McMillian v. State*, 594 So. 2d 1253 (Ala.Crim.App. 1991), remanded, 594 So. 2d 1288 (Ala. 1992). Overrides have been affirmed when the jury's recommendation was made part of the process of weighing aggravation against mitigation, see *Gentry v. State*, 595 So. 2d 548 (Ala.Crim.App. 1991), and when it was assessed in a separate analysis. See *Tarver v. State*, 500 So. 2d 1232 (Ala.Cr.App. 1986); *McNair v. State*, No. CR-90-1556 (Ala.Crim.App. Jan. 21, 1994). The appellate courts have further sanctioned whatever reasons the trial courts have given for finding the jury verdict lacking. See, e.g., *Boyd v. State*, 542 So. 2d 1247, 1259-60, 1269-70 (Ala.Crim.App. 1988), cert. denied, 493 U.S. 883 (1989); *Crowe v. State*, 485 So. 2d 351 at 364-65.<sup>36</sup>

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<sup>36</sup> In affirming a small number of overrides, the courts have provided an analysis that could approximate a standard of review. See, e.g., *Ex parte Hays*, 518 So. 2d at 777 (approving trial court's override because jury life recommendation for man convicted in lynching was "unquestionably a bizarre result"); *Jackson v. State*, No. 4 Div. 388 (Ala.Crim.App. Aug. 21, 1992), slip op. at 44-45 (upholding override where seasoned trial judge determined this was most heinous crime he had ever encountered). Yet while one Alabama Supreme Court justice has averred that the court "is especially sensitive" in evaluating overrides, *Ex parte Tarver*, 553 So. 2d 633, 634 (Ala. 1989) (Maddox, J., concurring), cert. denied, 494 U.S. 1090 (1990), this declaration is not borne out by any reasonable review of the cases.

The affirmance of petitioner's death sentence reflects the absence of any real review. Neither state appellate court examined whether the jury's life-without-parole sentence should have been sustained in petitioner's case. The appellate review of the jury's sentencing role in Louise Harris's case consisted of the routine response by the Court of Criminal Appeals that both Alabama and federal law permit the practice of judicial override. (J.A. 89). The state's high court affirmed the death sentence with no more than casual reference to the fact that the jury recommended life. (J.A. 103).<sup>37</sup> Neither court confronted the arbitrary process by which the jury recommendation was rejected nor questioned how that recommendation had been considered. Despite petitioner's objections to the override, the relative sentencing functions of the jury and judge were never reviewed in her case.

"[T]his Court has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency." *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990) (citations omitted). Appellate review is meant to serve as a check against random or arbitrary sentences of death, *Gregg v. Georgia*, 428 U.S. at 206, and to promote evenhanded, rational and consistent application of the sanction. *Jurek v. Texas*, 428 U.S. 262, 276 (1976). In failing to scrutinize death sentences resulting from overrides, the Alabama appellate courts are not providing meaningful review. See *Stringer v. Black*, 112 S.Ct. 1130,

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<sup>37</sup> On rehearing, the court dismissed Mrs. Harris's contention that judicial override also violated the state constitution. (J.A. 111)

1136 (1992) (close appellate scrutiny required of effect of arbitrary factor on sentencing decision); *Sochor v. Florida*, 112 S.Ct. 2114, 2122, 2123 (1992); *Clemons v. Mississippi*, 494 U.S. at 753-54; see also *Pensinger v. California*, 112 S.Ct. 351 (1991) (O'Connor, J., dissenting from denial of certiorari) (cursory affirmance of death sentence insufficient).<sup>38</sup>

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<sup>38</sup> The lack of any process or standard in Alabama directing the trial judge's consideration of a jury's advisory life verdict runs afoul not only of the Eighth Amendment but also the protections guaranteed under the Due Process Clause of the Fourteenth Amendment. The failure to regulate distribution of authority adequately among decisionmakers has been found to violate basic due process rights in a variety of contexts. For example, this Court recently undertook to determine "what procedures are necessary to ensure that punitive damages are not imposed in an arbitrary manner." *Honda Motor Co. v. Oberg*, 114 S.Ct. 2331, 2334 (1994). The Court held that Oregon's unique system of limiting judicial review of punitive damage awards by juries deprived litigants of due process, and that the very circumscribed review that was provided trial courts could not sufficiently ensure against arbitrariness. Focusing on the absence of guidance for the trial courts and the lack of meaningful review on appeal, the Court held that "when the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of Due Process." *Id.* at 2340. Cf. *Pacific Mutual Life Insurance v. Haslip*, 499 U.S. 1, 19-20 (1990) (upholding punitive damages assessment where Alabama required trial courts to give detailed reasons for interfering with jury's determination, where the appellate courts developed meaningful procedures for scrutinizing process, and where "detailed, substantive standards" were employed).

Like Oregon in *Honda Motor Co.*, Alabama has failed to create a procedure or norm for ensuring that arbitrary factors do not influence the capital sentencing verdict in cases of override. Its failure to furnish guidance to trial courts, to require judges to

#### IV. ALABAMA MUST CREATE SOME MECHANISM TO ENSURE AGAINST ARBITRARY CONSIDERATION OF A JURY LIFE-WITHOUT-PAROLE RECOMMENDATION AND TO PROVIDE MEANINGFUL APPELLATE REVIEW IN CASES WHERE THAT RECOMMENDATION IS REJECTED.

Alabama's capital sentencing scheme is in violation of basic Eighth Amendment principles at both the trial and appellate levels. The absence of any mechanism regulating the capital sentencing roles of jury and judge places capital defendants at risk of the kind of haphazard treatment of the jury's life recommendation at evidence in Louise Harris's case. *Maynard v. Cartwright*, 486 U.S. at 363; *Clemons v. Mississippi*, 494 U.S. at 748-49. The trial court's unexplained rejection of the advisory verdict, particularly in light of the single aggravating factor and the host of mitigating circumstances it found, was arbitrary. *Spaziano v. Florida*, 468 U.S. at 465-66. See also *Parker v. Dugger*, 498 U.S. at 322 (holding Florida Supreme Court's affirmance of death sentence in override case arbitrary).

Where a death penalty scheme provides for two sentencers, careful scrutiny of the process is particularly important. This Court has noted the significance of an appellate standard in reviewing cases of jury override:

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give detailed reasons on the record for their actions, or to provide meaningful appellate review where jury life recommendations are rejected deprives defendants such as Louise Harris of due process. See also *Gardner v. Florida*, 430 U.S. at 361-62.

Perhaps most importantly the Florida Supreme Court has held that the following standard must be used to review a trial court's rejection of a jury's recommendation of life: "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be *so clear and convincing that virtually no reasonable person could differ.*"

*Dobbert v. Florida*, 432 U.S. 282, 295 (1977) (quoting *Tedder v. State*, 322 So. 2d 908, 910 (1975)) (emphasis in *Dobbert*). See also *id.* at 295-96 (*Tedder* rule provides "crucial protection" against standardless override); *Parker v. Dugger*, 498 U.S. at 321 (crucial protection provided in jury override cases by Florida Supreme Court's system of review); *Spaziano v. Florida*, 468 U.S. at 465 (*Tedder* standard affords capital defendants "significant safeguard").<sup>39</sup>

While the Eighth Amendment does not prescribe a particular mechanism for regulating a judge's consideration of a jury life verdict, the Constitution does prohibit imposition of the death penalty through procedures that needlessly undermine the reliability of the capital sentencing process. Mrs. Harris must be sentenced according to a process that is not tainted by arbitrary considerations.




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<sup>39</sup> See also *id.* (Florida takes its standard seriously in evaluating propriety of overrides).

## CONCLUSION

For the reasons stated above, the judgment of the Alabama Supreme Court should be reversed insofar as it leaves undisturbed petitioner's sentence of death.

Respectfully submitted,

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